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## The Florida Bar v. Moriber, 314 So. 2d 145 (Fla. 1975)

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## CASE COMMENTS

**Attorney Discipline—ATTORNEY MAY BE PUNISHED FOR CHARGING EXCESSIVE FEE ABSENT AGGRAVATING CIRCUMSTANCES, FRAUD, OR DISHONESTY.—***The Florida Bar v. Moriber*, 314 So. 2d 145 (Fla. 1975).

Attorney Leonard Moriber entered into a written employment agreement with Theodore Pietz, which provided that Moriber was to collect all sums due Pietz as sole beneficiary of his mother's estate and was to receive one-third of the gross recovery if settled without suit, or 40 percent if suit was filed. Moriber wrote approximately seven letters, completed a few forms, made some telephone calls, and collected \$23,126.10 from mutual trust funds and \$823.31 from three other sources. He calculated his fee and advised his client by letter that he would forward \$13,468.05 to him upon execution by Pietz of a general release in favor of Moriber.<sup>1</sup> Thereafter, the Florida Bar filed a complaint against Moriber.<sup>2</sup> After a hearing, a referee found it improper for Moriber to demand the execution of a contingency agreement under the circumstances of the case. Nevertheless, the referee recommended discipline by the court only if Moriber failed to reimburse the difference between \$2,500, which the referee determined was a reasonable fee,<sup>3</sup> and the \$7,983.14 which Moriber had originally charged.<sup>4</sup> When Moriber failed to reimburse his client, the referee made an additional recommendation of prohibition from practicing law for 45 days.<sup>5</sup> Moriber still refused to repay the money to Pietz and the referee recommended that Moriber be suspended for 45 days. The Supreme Court of Florida, sua sponte, called for briefs from both sides;<sup>6</sup> in its unprecedented decision of April 9, 1975, the

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1. *The Florida Bar v. Moriber*, 314 So. 2d at 146-47.

2. A complaint is filed by the Florida Bar upon a finding by either a grievance committee or the Board of Governors of the Bar that probable cause exists to believe an accused is guilty of misconduct. A referee is appointed to try the matter in a "quasi-judicial administrative proceeding." A referee's report which contains a finding of guilt and a recommendation of public punishment is filed in the Florida Supreme Court, subject to review by either party. INTEGRATION RULE OF THE FLORIDA BAR 11.05, 11.06, 32 FLA. STAT. ANN. (Supp. 1975-76).

3. Moriber desired that the proceedings be confidential; he requested that no other attorneys testify as to the reasonableness of the fees. It was agreed by Moriber and the Florida Bar that the referee would determine the reasonableness of the fee. Report of Referee, filed in the Supreme Court Feb. 8, 1974, at 5.

4. 314 So. 2d at 147-48.

5. *Id.* at 148.

6. See note 2 *supra*. Rule 11.09(3)(f) provides that the referee's recommendation of punishment will be adopted by the court unless the court directs the parties to submit briefs or arguments as to the suitability of the referee's recommendation. INTEGRATION RULE OF THE FLORIDA BAR 11.09(3)(f), 32 FLA. STAT. ANN. (Supp. 1975-76).

court suspended Moriber from the practice of law for the sole offense of charging an excessive fee. It held that the fee charged was not merely excessive, but "was so 'clearly excessive' as to constitute a violation of DR [Disciplinary Rule] 2-106 . . . ."<sup>7</sup>

Although the court's action was well within the confines of its discretion,<sup>8</sup> the decision raised questions regarding the freedom of lawyers to contract with their clients, the propriety of contingency fees, and standards for judicial review of attorneys' fees. These three issues are part of the larger question of the court's power to interfere with the private dealings of attorneys and clients, and to discipline members of the bar.

The notion that the practice of law is not a business venture, but a privilege which may be revoked, is not a modern development.<sup>9</sup> The Supreme Court of Florida first addressed the issue of its power to discipline state attorneys in the 1868-69 term,<sup>10</sup> and cited the 1275 Statute of Westminster as its authority.<sup>11</sup> Later, the court noted that the quotation from the Statute of Westminster was incomplete,<sup>12</sup> but that the thrust of the original language was not diminished by the omission.<sup>13</sup> In 1930, the court observed that the power to discipline attorneys "did not exist in the courts at common law, and did not come definitely into existence as a court function until the statute of 4

7. 314 So. 2d at 149.

8. There is generally no prescribed discipline for any particular type of improper conduct. The disciplinary measures taken are discretionary with the courts, which may disbar, suspend, or merely censure the attorney as the nature of the offense and past indicia of character may warrant.

Note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L. REV. 489, 495 (1958) (footnote omitted).

9. 'When . . . the Bar had become a profession we find that the praetor or provincial governor could suspend a particular advocate from practice in his court either temporarily or permanently; but it had not yet reached this stage in Cicero's time . . . .'

Cohen, *The Origins of the English Bar*, 30 L. Q. REV. 464 (1914) (citation omitted, omitted).

10. State *ex rel. Wolfe v. Kirke*, 12 Fla. 278 (1868-69 Term).

11. Statute of Westminster, the First, 3 Edw. I, c. 29 (1275). See note 13 *infra* for text of the statute.

12. Application of Harper, 84 So. 2d 700, 704-05 (Fla. 1956).

13. The statute correctly reads as follows:

It is provided also, That if any Serjeant, Pleader, or other, do any Manner of Deceit or Collusion in the King's Court, or consent unto it, in Deceit of the Court, or to beguile the Court, or the Party, and thereof be attainted, he shall be imprisoned for a Year and a Day, and from thenceforth shall not be heard to plead in that Court for any Man . . . .

Statute of Westminster, the First, 3 Edw. I, c. 29 (1275). See also Cohen, *supra* note 9, at 479.

Henry IV, c. 18.”<sup>14</sup> The court noted that this statute became effective in Florida when the act of November 1829 was adopted, which declared the common law and statutes of England of a general nature to July 4, 1776, to be of force in this state.<sup>15</sup> In 1964,<sup>16</sup> the court again relied upon English history to support its power to discipline attorneys, setting forth a brief history of the Inns of Court and the Benchers of the Inns.<sup>17</sup> As recently as July 1975,<sup>18</sup> the court reaffirmed its exclusive power to regulate the bar in a decision which held the Financial Disclosure Law<sup>19</sup> inapplicable to officers of the court. The court noted that the legislature has no constitutional power to adopt a code of ethics designed to govern conduct of members of the judicial branch.<sup>20</sup> It is clear, then, that the authority of the Florida Supreme Court to discipline those who practice before it is beyond dispute.

Historically, courts have asserted that the purpose of their authority to discipline is not to punish the individual attorney, but to preserve the purity of the bar and to protect the public from unscrupulous practitioners.<sup>21</sup> It is against this background of power and purpose, then, that the *Moriber* case rests. The court based its decision on two distinct, but intertwined considerations: that the fee was “clearly excessive,” and that it was based upon a contingency fee arrangement. The *Moriber* court noted that there are few areas in attorney discipline which are as subject to differing interpretation as the matter of what constitutes excessive attorneys’ fees.<sup>22</sup> By its decision in *Moriber*, though,

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14. *Gould v. State*, 127 So. 309, 311 (Fla. 1930). The *Wolfe* court noted that the power to punish existed before there was a recognized class of attorneys, for the first roll of attorneys was introduced by 4 Henry IV, c. 18. 12 Fla. at 283-84.

15. 127 So. at 311. The act of November 6, 1829, is codified as FLA. STAT. § 2.01 (1975).

16. *The Florida Bar v. Massfeller*, 170 So. 2d 834 (Fla. 1964).

17. As early as the 13th century there were organized in England the Inns of Court which were voluntary non-corporate and self-governing legal societies. Then the Benchers, who were senior members of the Inns, were entrusted with power to discipline and even disbar a barrister guilty of misconduct. The Courts, as successors to the “Benchers,” have from time immemorial, both in England and in this country, exercised as authority inherent in them, and without question, the right and power to discipline members of the Bar practicing before them.

*Id.* at 838.

18. *In re The Florida Bar*, 316 So. 2d 45 (Fla. 1975).

19. FLA. STAT. § 112.3145 (1975).

20. 316 So. 2d at 47.

21. *See, e.g., Ex parte Wall*, 107 U.S. 265 (1882); *The Florida Bar v. Welch*, 272 So. 2d 139 (Fla. 1972); *The Florida Bar v. Loveland*, 249 So. 2d 19 (Fla. 1971); *The Florida Bar v. King*, 174 So. 2d 398 (Fla. 1965); *State ex rel. Florida Bar v. Rubin*, 142 So. 2d 65 (Fla. 1962); *Gould v. State*, 127 So. 309 (Fla. 1930). *See also* 7 AM. JUR. 2d *Attorneys at Law* §§ 18, 25 (1963).

22. 314 So. 2d at 148. The relationship of money to systems of justice is an ancient one, and is viewed with distaste. The Statute of Westminster, the First, stated:

And forasmuch as many complain themselves of Officers, Cryers of Fee, and the

the court signaled its willingness to enforce DR 2-106<sup>23</sup> of the Code of Professional Responsibility, adopted on June 3, 1970.<sup>24</sup>

Factors to be considered in determining an attorney's fee are contained in DR 2-106(B)(1)-(8) of the Code.<sup>25</sup> Using these guidelines, the court found that Moriber's task was not difficult, did not present a novel legal issue, involved very little expenditure of time, and in fact "could have easily been performed by a layman."<sup>26</sup> Having made these findings, the court, rather than declaring the fees to be clearly

Marshals of Justices in Eyre, taking Money wrongfully of such as recover Seisin of Land, or of them that obtain their Suits, and of Fines levied, and of Jurors, Towns, Prisoners, and of others attached upon Pleas of the Crown, otherwise than they ought to do, in divers Manners; and forasmuch as there is greater Number of them than there ought to be, whereby the People are sore grieved; The King commandeth that such Things be no more done from henceforth; and if any Officer of Fee doth it, his Office shall be taken into the King's Hand; and if any of the Justices Marshals do it, they shall be grievously punished at the King's Pleasure; and as well the one as the other shall pay unto the Complainants the treble Value of that they have received in such manner.

Statute of Westminster, the First, 3 EDW. I, c. 30 (1275). See also Cohen, *supra* note 9, at 479.

In England, the idea of compensation in connection with the workings of justice was so distasteful that a barrister's fee was considered an honorarium. H. DRINKER, *LEGAL ETHICS* 169 (1953).

[I]n bygone times, when counsel met their clients at the pillars in St. Paul's and round Doctors' Commons, the client used to deposit in the purse at the back of the advocate's gown (theoretically without the latter's knowledge) whatever honorarium he chose to mark thus delicately his sense of gratitude.

*Id.* at 169-70 n.5. It is interesting to note that in this often cited treatise the subject is indexed under the word "compensation" rather than "fee."

23. THE FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106, 32 FLA. STAT. ANN. (Supp. 1975-76), provides:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

24. *In re* Integration Rule of The Florida Bar, 235 So. 2d 723 (Fla. 1970).

25. THE FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B), 32 FLA. STAT. ANN. (Supp. 1975-76), provides:

(1) The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

26. 314 So. 2d at 148.

excessive, stated: "The respondent's use of a contingent fee arrangement under the circumstances of this case was manifestly improper."<sup>27</sup> This juxtaposition of the two separate factors of excessive fees and contingency fees demonstrates their interrelationship in the court's analysis.<sup>28</sup>

The history of the contingent fee is an unsavory one.<sup>29</sup> In Florida, early guidelines for attorneys' conduct in regard to contingent fees were provided in Resolution XXIV of "Hoffman's Fifty Resolutions in Regard to Professional Department," reproduced in the 1906 Year Book of the Jacksonville Bar Association.<sup>30</sup> The Resolution manages at once to condemn contingency fee arrangements yet recognize their necessity,<sup>31</sup> and reaches a tenuous ethical compromise relative to the merits of compensation in the ratio of risk.<sup>32</sup>

27. *Id.*

28. The identification of contingency fees with excessive fees demonstrates the repugnance of the profession in general for the contingency fee arrangement. But so long as contingency fees are not prohibited by the Code of Professional Responsibility, their use should not be subject to indirect penalization.

Clearly a contingent fee and an excessive fee are not convertible terms and there have been as many complaints of excessive fees which were not dependent upon the result of litigation as of those which were so dependent.

Radin, *Contingent Fees in California*, 28 CAL. L. REV. 587, 591-92 (1940).

29. Champerty, as a species of maintenance, came to be applied to lawyers' contingent fee contracts. The old identification with the transfer of a litigious right and the assumption of expenses by the champertor was lost and champerty was soon defined as "the unlawful maintenance of a suit in consideration of some bargain to have a part in dispute, or some profit out of it."

Comment, *Lawyer's Tightrope—Use and Abuse of Fees*, 41 CORNELL L.Q. 683, 686 (1956) (footnote omitted).

"[A]t the present time, in places where it [contingent fee] is not void, it is looked upon with disfavor, not to say with contempt." Radin, *supra* note 28, at 587.

30. H. DRINKER, *supra* note 22, Appendix E.

31. I will never be tempted by any pecuniary advantage however great, nor be persuaded by any appeal to my feelings however strong, to purchase, in whole or in part my client's cause. . . . Cases may arise in which it would be mutually advantageous thus to bargain, but the experiment is too dangerous, and my rule too sacred to admit of any exception, . . . better would it be that my client should suffer, and I lose a great and honest advantage, than that any discretion should exist in a matter so extremely liable to abuse, and so dangerous in precedent.

And though I have thus strongly worded my resolution, I do not thereby mean to repudiate, as wholly inadmissible the taking of contingent fees—on the contrary, they are sometimes perfectly proper and are called for by public policy, no less than by humanity.

*Id.* at 343.

32. . . . I renew my resolution never so to purchase my client's cause, in whole or in part; but still reserve to myself, on proper occasions, and with proper guards, the professional privilege (denied by no law among us) of agreeing to receive a contingent compensation . . . .

*Id.* at 344.

The necessity of contingency fees<sup>33</sup> was recognized by the American Bar Association in 1908, when it modified proposed Canon 13 by deleting the cautionary phrase that contingency fees "lead to many abuses" and incorporating a provision that the purpose of the rule was to protect clients from unjust charges.<sup>34</sup> Ethical Consideration 2-20<sup>35</sup> of the Code of Professional Responsibility now provides the guidelines for lawyers in Florida.<sup>36</sup>

Florida case law is meager in the area of contingency fees. The Florida courts have held that proper contracts for contingency fees will generally be upheld.<sup>37</sup> On the other hand, they have found a two-thirds fee unconscionable, even where the possibility of successful outcome was exceedingly unlikely,<sup>38</sup> and have held contingency fee arrangements in matters of matrimonial action to be against public policy.<sup>39</sup> One re-

33. The case for and against a contingent fee, if we disregard considerations of history and what may be called snobbery, may be briefly summarized. The contingent fee certainly increases the possibility that vexatious and unfounded suits will be brought. On the other hand, it makes possible the enforcement of legitimate claims which otherwise would be abandoned because of the poverty of the claimants.

Radin, *supra* note 28, at 589.

34. The text was changed from "13. *Contingent Fees*. Contingent fees lead to many abuses, and where sanctioned by law should be under the supervision of the Court." to "13. *Contingent Fees*. *Contingent fees, where sanctioned by law, should be under the supervision of the Court in order that clients may be protected from unjust charges.*" 33 A.B.A. REP. 567, 579 (1908).

35. "The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive."

THE FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement, 32 FLA. STAT. ANN. (Supp. 1975-76).

36. THE FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20, 32 FLA. STAT. ANN. (Supp. 1975-76), provides:

Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement.

37. *The Florida Bar v. Moore*, 194 So. 2d 264 (Fla. 1966) (where the court found that the fee was not earned, rather than that the fee was excessive); *Cone v. Benjamin*, 27 So. 2d 90 (Fla. 1946); *Johnston v. Cox*, 154 So. 206 (Fla. 1934).

38. *McCreary v. Joel*, 186 So. 2d 4 (Fla. 1966) (the court noted that the case was not a disciplinary one).

39. *Sobieski v. Maresco*, 143 So. 2d 62 (Fla. 3d Dist. Ct. App. 1962). But contingency

cent case, decided 9 months before *Moriber* by a district court of appeal, is noteworthy for the rather startling conclusion that where a client entered a contingency fee arrangement with attorneys to pursue claims against her deceased grandfather's estate, and a will was later discovered naming her the sole legatee, she was nonetheless responsible to her counsel for sustaining the probate of the will, both in the trial court and through appellate review.<sup>40</sup> Disputes involving the propriety of contingency fees are decided on a case-by-case basis; therefore, existing case law provides few criteria for the practicing attorney.<sup>41</sup>

Case law on the issue of excessive fees is equally unproductive of definitive standards due to the difficulty in separating aggravating circumstances from the offense of charging excessive fees. Unprofessional conduct draws as much, if not more, judicial censure. For example, in *The Florida Bar v. Winn*,<sup>42</sup> an attorney charged a client (who earned \$14.26 a week) \$3,500 for representing her in a divorce proceeding. Additionally, the attorney failed to advise the courts of his client's prior adjudication of incompetency. In *The Florida Bar v. Scott*,<sup>43</sup> an attorney paid himself a \$2,000 fee from trust funds. A referee found the fee was 10 times greater than the fee to which he was entitled. The attorney also converted \$6,401.84 of the trust funds, for which he was convicted of grand larceny. The *Winn* and *Scott* cases exemplify attorney conduct which Florida courts have found deserving of punishment; they are illustrative of the difficulty involved in isolating the elements of an attorney's offense.<sup>44</sup>

The *Moriber* court turned from its brief, singular reference to *Moriber*'s contingency fee agreement with his client to address the defenses raised to the charge of assessing excessive fees. Those defenses were: (1) excessiveness could not be charged against *Moriber* absent a showing of fraud or dishonesty; (2) his client had requested that the matter be kept strictly confidential; and (3) his client was fully

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fee contracts are enforceable when they relate to return of separate property of a spouse. *Salter v. St. Jean*, 170 So. 2d 94 (Fla. 3d Dist. Ct. App. 1965).

40. *Lungu v. Horton*, 298 So. 2d 423, 424 (Fla. 3d Dist. Ct. App. 1974).

41. A petition by the Florida Bar to amend Disciplinary Rules 2-106(B) and 2-107 was filed with the supreme court on November 18, 1975. This petition seeks extensive modification of the rules governing contingency fees. The amended rules would provide for fixed maximum percentages of recovery which may be charged by an attorney; that contingency fee contracts must be in writing; and that contracts which exceed the standards without judicial permission will be presumed to be clearly excessive. If the petition is granted, equivocal treatment of contingency fees will be moderated. *In re The Florida Bar*, No. 48,384 (Fla. Nov. 18, 1975).

42. 208 So. 2d 809 (Fla. 1968).

43. 227 So. 2d 195 (Fla. 1969).

44. See note 51 and accompanying text *infra*.



aware of the terms of the contingency fee arrangement.<sup>45</sup> Moriber did not raise as a defense the required standard of clear and convincing proof, though such a defense has been successfully used in disciplinary cases.<sup>46</sup>

Countering Moriber's first defense, the court quoted the provisions of Rule 11.02(4) of the Integration Rule of the Florida Bar: "' . . . Controversies as to the amount of fees are not grounds for disciplinary proceedings unless the amount demanded is *clearly excessive*, extortionate or the demand is fraudulent.'" <sup>47</sup> The words "clearly excessive" were added to the rule to comport with the change in DR 2-106 promulgated by the American Bar Association on August 12, 1969.<sup>48</sup> Neither the brief of the Florida Bar nor the brief of Moriber contained citation to any case directly on point, for the simple reason that there are no cases.<sup>49</sup> As the law stood before the adoption by the American Bar Association of the Code of Professional Responsibility, an excessive fee was generally regarded as insufficient to warrant disciplinary action unless there were other factors coupled with it.<sup>50</sup> But charging a fee

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45. 314 So. 2d at 148, 149.

46. The Florida Bar v. Quick, 279 So. 2d 4 (Fla. 1973) (clear and convincing evidence necessary); The Florida Bar v. Schonbrun, 257 So. 2d 6 (Fla. 1971) (referee's finding was not supported by clear and convincing proof); The Florida Bar v. Rayman, 238 So. 2d 594 (Fla. 1970) (quantum of proof necessary to disbar need not be beyond and to the exclusion of a reasonable doubt, but clear and convincing). The defense was unsuccessfully asserted in The Florida Bar v. Welch, 272 So. 2d 139 (Fla. 1972).

47. 314 So. 2d at 148.

48. The Florida Supreme Court, on June 3, 1970, adopted a Code of Professional Responsibility which is substantially identical to that of the American Bar Association. 235 So. 2d 723 (Fla. 1970).

49. The cases relied on by Moriber were from other jurisdictions and were not recent decisions. They were: United States v. Stringer, 124 F. Supp. 705 (D. Alas. 1954) (excessive fee generally regarded as insufficient to warrant disciplinary action unless there are other factors); Herrscher v. State Bar of California, 49 P.2d 832 (Cal. 1935) (excessive fee will not of itself warrant discipline without the presence of fraud, overreaching, or failure to disclose true facts to client); People *ex rel.* Chicago Bar Ass'n v. Green, 187 N.E. 811 (Ill. 1933) (there is no exact standard for fixing fees; absent willful overreaching, an attorney should not be condemned); Swanson v. Hempstead, 149 P.2d 404 (Cal. Ct. App. 1944) (whether a contingent fee contract is unconscionable is to be determined by the facts existing at the time the contract was entered into). The Florida Bar acknowledged the lack of precedent: "This case is unique because it lacks many such aggravating factors [fraud or dishonesty] typically found in excessive fee cases in other jurisdictions." Brief of Complainant at 5, The Florida Bar v. Moriber, 314 So. 2d 145 (Fla. 1975).

50. United States v. Stringer, 124 F. Supp. 705 (D. Alas. 1954) (*see note 49 supra*); *Ex parte* Goodman, 37 N.E.2d 345 (Ill. 1941) (grossly excessive charges accompanied by indefensible acts to coerce payment); *In re* Myrland, 95 P.2d 56 (Ariz. 1939) (discipline is proper where fee is so excessive and unconscionable that it could not have been charged in good faith); *In re* Quinn, 135 A.2d 869 (N.J. 1957) (the touchstone for determining if fee is sufficiently excessive to require discipline is moral turpitude); Haunstein v. State Bar of Oklahoma, 46 P.2d 558 (Okla. 1935) (where attorney was not guilty

grossly disproportionate to the services performed was misconduct that warranted disciplinary action, in the absence of contingencies justifying a large fee.<sup>51</sup> The former proposition had the greater support of Florida case law for those incidents occurring prior to 1970.<sup>52</sup> A trend towards the latter proposition was signaled in a 1973<sup>53</sup> case involving incidents occurring in 1969. The court based its decision on former Rule 11.02(4), but noted that future cases would be governed by the amended rule which provides for discipline for excessive fees. The *Moriber* decision clearly demonstrates the court's willingness to enforce this provision of DR 2-106. As discussed below, however, the court may continue to apply the conservative standards of the past.

The court gave scant consideration to the second defense proffered by Moriber, *i.e.*, the degree of secrecy demanded by his client. The court noted there is no connection between the strict confidence required of every attorney-client relationship and the amount of fee which may be charged.<sup>54</sup>

Moriber's third defense was that his client was fully informed of the terms of the agreement, entered willingly into the contract, and therefore the court was without power to interfere in the contractual relationship. In addressing this defense, the court used language similar to that of the Supreme Court of California in the 1931 benchmark case

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of fraud or deception of client, excessive fee was not grounds for disbarment).

51. *Bushman v. State Bar of California*, 522 P.2d 312 (Cal. 1974) (*see* note 52 and accompanying text *infra*); *In re Cary*, 177 N.W. 801 (Minn. 1920) (fee so excessive in comparison with services rendered as to demonstrate a person of greed who should not be allowed to bargain for professional fees); *In re Loring*, 301 A.2d 721 (N.J. 1973) (discipline is called for if fee is so excessive as to evidence an attempt to overreach the client); *State ex rel. Nebraska State Bar Ass'n v. Richards*, 84 N.W.2d 136 (Neb. 1957) (charging of "clearly" excessive fee is ground for suspension or disbarment).

52. *The Florida Bar v. Welch*, 272 So. 2d 139 (Fla. 1972) (attorney exerted undue influence on mentally disoriented client to obtain execution of the deed to her \$14,000 homestead to his wife for \$700 consideration); *The Florida Bar v. Britton*, 255 So. 2d 525 (Fla. 1971) (attorney received double compensation for services in divorce case; her truculence, professional misconduct and improper solicitation were considered by the court in its entry of a public reprimand); *The Florida Bar v. Scott*, 227 So. 2d 195 (Fla. 1969) (attorney who paid himself from trust funds a fee 10 times greater than he was entitled to, and converted trust funds to his own use, for which he was convicted of grand larceny, disbarred); *The Florida Bar v. Rodriguez*, 226 So. 2d 99 (Fla. 1969) (attorney whose acceptance of fees was accompanied by unprofessional conduct and mishandling of trust funds suspended for 2 years); *The Florida Bar v. Winn*, 208 So. 2d 809 (Fla. 1968) (attorney suspended for 6 months for charging client who had been adjudged incompetent and who earned \$14.26 per week, \$3,500 for unproductive and ill-considered litigation; and charging another client a 50% contingency fee for property recovered for client-defendant in a divorce case, where plaintiff-husband died prior to the divorce and the property passed by operation of law).

53. *The Florida Bar v. Quick*, 279 So. 2d 4 (Fla. 1973).

54. 314 So. 2d at 149.

of *Goldstone v. State Bar*,<sup>55</sup> stating: "an attorney may still be disciplined for overreaching where the fees charged are grossly disproportionate to the services rendered."<sup>56</sup> The test of *Goldstone*, still followed by the California Supreme Court, is "whether the fee is 'so exorbitant and wholly disproportionate to the services performed as to shock the conscience.'"<sup>57</sup> It is curious that the Florida Supreme Court chose to use the standards that existed prior to 1970, rather than the express language of the present rule, to overcome Moriber's defense that the client willingly accepted the terms of the fee contract. Disciplinary Rule 2-106(A) clearly states: "A lawyer *shall not enter into* an agreement for, charge, or collect an illegal or clearly excessive fee";<sup>58</sup> it is obvious that the rule contemplates proscription of overreaching at the contracting as well as at the collecting stage. The court did not, however, rely upon this language of the rule; therefore, it must in a later case clarify the standards which it will utilize.

Having determined that the fee was "clearly excessive"<sup>59</sup> in violation of DR 2-106, the court proceeded to a determination of the appropriate discipline. The assessment of discipline is solely within the discretion of the court,<sup>60</sup> its only guidelines being "the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations";<sup>61</sup> "a standard of conscience . . . not according to technical rules."<sup>62</sup> Although the avowed purpose of attorney discipline is not punishment, but the protection of society,<sup>63</sup> and "neither prejudice nor passion should enter into determination,"<sup>64</sup> there is undeniably an element of retribution in disciplinary proceedings.

The court noted Moriber's "patent disregard for applicable rules

55. 6 P.2d 513, 516 (Cal. 1931).

56. 314 So. 2d at 149.

57. *Bushman v. State Bar of California*, 522 P.2d 312, 314 (Cal. 1974).

58. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 23 (emphasis added).

59. The court emphasized its decision by utilizing formal language: "We hold" the fee to be "clearly excessive." 314 So. 2d at 149.

60. See note 8 *supra*.

61. THE FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement, 32 FLA. STAT. ANN. (Supp. 1975-76):

The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances. An enforcing agency, in applying the Disciplinary Rules, may find interpretative guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

62. 127 So. at 310-11.

63. See note 21 and accompanying text *supra*.

64. *The Florida Bar v. Thomson*, 271 So. 2d 758, 761 (Fla. 1972).

of professional ethics as well as his own promise given under oath to reimburse his client" as an aggravating factor.<sup>65</sup> It then cited the case of *The Florida Bar v. Winn*,<sup>66</sup> in which the court had suspended an attorney for 6 months "[o]n facts scarcely more aggravating than those presented here."<sup>67</sup> Although Moriber had practiced in Florida since 1953 with "no prior disciplinary punishments,"<sup>68</sup> it is clear that the court considered Moriber's unrepentant attitude a severely aggravating factor which weighed in its decision to suspend him from the practice of law for 45 days, his reinstatement conditioned upon restitution of the excessive portion of the fee.

In *Moriber*, the Supreme Court of Florida, although censuring an attorney for clearly excessive fees, indicated an unwillingness to relinquish the old standards of judging fees to be excessive, and will probably continue to punish only those who charge fees which "shock the conscience" of the court.

CAROL ANN TURNER

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**Constitutional Law—DUE PROCESS—GEORGIA PREJUDGMENT GARNISHMENT PROCEDURES INVALID.—*North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975).**

On August 20, 1973, plaintiff Di-Chem, Inc. filed suit in the superior court of Whitfield County, Georgia, alleging that defendant North Georgia Finishing, Inc. owed it \$51,279.17 for goods sold and delivered. Simultaneously, Di-Chem filed affidavit and bond for process of garnishment,<sup>1</sup> asserting that it had "reason to apprehend the loss of said sum

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65. 314 So. 2d at 149. The fact that Moriber knew at the time the contract was executed that Pietz was the sole beneficiary of approximately \$20,000 in trust funds was specifically noted by the court. *Id.* at 146.

66. 208 So. 2d 809 (Fla. 1968).

67. The facts which the court considered "scarcely more aggravating" are set out in note 52 *supra*.

68. 314 So. 2d at 148.

1. The procedural prerequisites to obtaining a writ of garnishment in Georgia are governed by GA. CODE ANN. § 46 (1974); the statute provides exemptions for wages. GA. CODE ANN. § 46-101 (1974). It requires that the plaintiff sign an affidavit before some officer authorized to issue an attachment or the clerk of any record court, stating the amount claimed due, the apprehension of loss of all or part of the amount claimed due, and postage of a double bond. GA. CODE ANN. § 46-102 (1974). The affidavit may be